precautions to conceal his presence within the local limits of the jurisdiction and that there is reason to believe such person is taking such precautions with a view to committing an offence . . . . such Court may, in manner hereinafter provided require such person to shew cause why he should not be ordered to execute a bond with sureties for his good behaviour for such period not exceeding six months as the Court thinks fit to fix."

Section 78 provides that the order, which must be in writing shall set forth

(a) the substance of the information received;
(b) the amount of the bond to be executed;
(c) the term for which it is to be in force; and
(d) the number, character and class of sureties, if any, required.

I may say at the outset, that s. 78 was properly complied with. The order itself shewed the substance of the offence as contained in the information, almost *verbatim*, except that the information gave the name of the occupant of the compound at 50, Cross Street.

The defect lies in the information itself. It will be observed that para. (a) of s. 76 sub-s. 1 consists of two parts:—(a) there must be the taking precautions to conceal the presence and (b) there must be reason to believe that such precautions are taken with a view to committing an offence.

The information itself, and consequently the subsequent order, entirely omitted any reference whatsoever to the latter part of the paragraph.

Merely taking precautions to conceal oneself does not bring any one within the ambit of the paragraph and the essential and material part is that there must be an allegation that there is reason to believe that such is done with a view to committing an offence.

In my opinion such omission was fatal and was not such as could be cured either under s. 448 or s. 162. The omission is not a mere error of procedure but is a material and substantive error in not complying with a provision which is mandatory.

This section provides for bringing a person before the Court without charging him with a specific and substantive breach of the criminal law and for ordering such person to give security for future good behaviour and in the event of such security not being forthcoming there is power to order imprisonment up to a maximum of 12 months.

This and the following section contain necessary provisions for the protection of the public against vagrants and other bad characters but the conditions under which such persons can be deprived of their liberty must be strictly complied with.

In this case the fact that there was reason to believe an intention on the part of the two men to commit a crime was an essential element in the information, which was omitted and consequently was not alleged against them and therefore the information, on which the subsequent order was based, was bad *ab initio*.

Judgment Accordingly.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, Ag. C.J.

September 9, 1937.

IN RE SEAH LIANG SEAH DECEASED.

[SINGAPORE ORIGINATING SUMMONS No. 38 of 1937]

Trustees—Beneficiaries—Right to retention of shares of estate and to set-off against liabilities incurred by Trustees personally to the Estate.

A claim was made against trustees of an estate that they had neglected their duty by failing to recover debts due to the estate by reason of which failure any claims against the debtors became barred by limitation and that the trustees or their estate were liable therefor. The trustees were also beneficiaries and the applicant, another trustee, now sought to retain the beneficial interests of the beneficiary-trustees so far as was required to make up the loss to the estate caused by the alleged breach of duty.

Held, that where there is an aggregate fund in which the trustee is beneficially interested and to which he owes something, he must be taken to have paid himself that amount on account of his share; and the Court treats the trustee as having received his share by anticipation. And such a claim against trustee beneficiaries to retain the share of the trustee-beneficiaries in the estate must be a claim in respect of a debt which he owes the estate. It does not apply to the trustee beneficiaries liability for devastavit until such claims have been established, if it cannot be said that part of the trust estates has already come into their hands or that they have been paid their shares *pro tanto*.

ADJOURNED ORIGINATING SUMMONS.

Dr. Withers Payne for Applicant Trustee, Seah Eng Thye.

Seth for Respondents, Seah Eng Kiong and Seah Eng Tong, Co-trustees

Johannes for Respondent, Seah Eng Teck, Retired Trustee.

Dr. Withers Payne, for Applicant, cites as to Seah Eng Choe, debtor and beneficiary of the estate—

re Taylor, (1894) 1 Ch. 674.

re Wheeler, (1904) 2 Ch. 66, 71.

re Akerman, (1891) 3 Ch. 212.

As to the Respondents—

re Akerman (*sup*).

re Toby v. *Toby*, (1858) 25 Beav. 632.

re Jacobs v. *Rylance*, (1874) 17 Eq. 341.

re Chillingworth v. *Chambers*, (1896) 1 Ch. 685, 690, 710.

re Brown (1886) 32 Ch. D 597, 600, 603.

re Doering v. *Doering*, (1889) 42 Ch. D 203, 207.

re Rhodesia Goldfields, (1901) 1 Ch. 239. 245.

re Dacre, (1916) 1 Ch. 344, 346.

re Towndrow, (1911) Ch. D. 662, 668.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

TERRELL, AG. C.J.—The applicant is a trustee of the will of the abovenamed deceased. The respondents Seah Eng Kiong and Seah Eng Tiong are co-trustees of the will, the respondent Seah Eng Teck was a former trustee who has retired. Seah Eng Choe who is also a respondent is a debtor to the estate in the sum of $1,500 and is also a beneficiary.

It appears that apart from Seah Eng Choe various other persons, not beneficiaries, were also indebted to the estate at the time of the testator's death, although all such debts are now statute barred. Under an order made in this action on the 19th March 1937, certain inquiries were directed, and according to the report of the Registrar filed on the 11th June 1937, it appears that although all the debts have now been lost to the estate, debts to the extent of $18,115 could have been recovered, if appropriate action had been taken before they became statute barred. On the 12th July 1937, a further order was made that the applicant be at liberty to commence actions at the cost of the estate against the respondents Seah Eng Kiong, Seah Eng Teng and Seah Eng Teck in respect of the debts which in the opinion of the Registrar would have been recoverable. Such actions would be claims against the trustees for having committed devastavits in respect of sums which they ought to have but failed to recover for the estate. No such actions have however been commenced, and it is probable that any claims against the trustees would also be barred by limitation. The following sums are due to the respondents as beneficiaries in the trust estate:—

Seah Eng Kiong	..	$5,069.07
Seah Eng Teng	..	6,045.93
Seah Eng Teck	..	2,559.06
Seah Eng Choe	..	557.92

These sums represent partly income from specific immovable property settled by the will of the testator and partly income from the residuary trust estate. The debts on the other hand, if recovered, would have fallen into the residuary trust estate only. The applicant now applies that he may be entitled to retain the abovementioned sums which amount to $14,231.98 and to credit the capital account of the residuary estate therewith, and that he be at liberty to defend any action brought against the trustees in respect of the sums to which the respondents are entitled as beneficiaries.

The principle under which trustees can retain the share of a beneficiary has been laid down in many cases, but it is necessary to see within what limits that principle can be applied. The principle is stated by Kekewich, J. in *In re Akerman*, (1891) 3 Ch. 212 at p. 219 as follows:—

> "A person who owes an estate money, that is to say who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it. Nothing is in truth retained by the representative of the estate, nothing is in strict language set off, but the contributor is paid by holding in his own hand a part of the mass, which, if the mass were completed, he would receive back. That is expanding what the Lord Chancellor calls in *Cherry* v. *Boultbee* (4 Mylne & Craig p. 442 at p. 447) a right to pay out of the fund in hand rather than a set off."

In the later case of *In re Rhodesia Goldfields* (1910) 1 Ch. p. 239 the principle was applied even when the claim against the defaulting trustee had not yet been established, at p. 245 Swinfen Eady J. says:—

> "There is a claim against Partridge in respect of moneys which it is alleged had not really been applied in buying stocks and shares but had passed into his pocket, and, being moneys of the company, ought not to have passed into his pocket at all. That is a claim not in damages, but in debt"

and later p. 24

> "In my judgment the rule is of general application that .... where a fund is being distributed, a party cannot take anything out of the fund until he makes good what he owes to the fund. It is immaterial whether the amount is actually ascertained or not."

In the case of *In re Towndrow* (1911) 1 Ch. 662 Parker J. stated the principle in the following terms:—

> "The real principle is that, where there is an aggregate fund in which the trustee is beneficially interested, and to which he owes something, he must be taken to have paid himself that amount on account of his share"

and on p. 668 he says:—

> "The theory on which that rule is based is that the Court treats the trustee as having received his share by anticipation, and the answer to any claim by the trustee is 'you have already received your share, you have it in your own hands'."

That case also decides that a specific legacy cannot be retained to answer an indebtedness to the residuary estate.

The effect of the above authorities would appear to be that the claim against the beneficiary or trustee beneficiary must be a claim in respect of a debt which he owes to the estate. He is deemed in equity already to have been paid, and the principle clearly applies to the claim against Seah Eng Choe, who has received advances to the extent of $1,500 and was indebted to the testator in this sum. But the claim against the other respondents is something very different. It is alleged that they are liable for devastavits. These claims have not yet been established and such claims are more in the nature of claims for damages for failure to do their duty as trustees. If the claims had been established they might be described as judgment debts, but for the present it cannot be alleged that they are debts in the sense that the trustees have ever taken the sums claimed from the trust estate.

It cannot be said that part of the trust estate has already come into their hands or that they have been paid their shares *pro tanto*.

In my opinion therefore the applicant is really trying to obtain a lien in respect of a claim for breach of trust which may or may not be established. Such a claim does not fall within the principle of any of the decided cases. There is the further point that the sum of $18,115 is due to the residuary estate, whereas part at all events of the moneys now payable to the beneficiaries is in respect of their interest in a specific legacy of immovable estate to which the residuary legatees have no claim whatever. Even therefore if the trustee had this so-called right of retainer, it would only apply to such part of the sums payable to each of the respondent trustees as is properly attributable to income from the residuary estate.

The applicant will accordingly be entitled to retain the sum of $557.92 payable to Seah Eng Choe and to defend any action which he may bring in respect thereof at the expense of the estate. There will be no order on the remainder of the summons. The costs of the applicant will be taxed as between solicitor and client and paid out of the residuary estate. Other costs will be reserved. A special fee of $50 is allowed under O. 62 r. 49(1).

Order Accordingly.

Solicitors for applicant-trustee:—*Drew & Napier.*

Solicitors for Seah Eng Teck:—*Johannes & Sammy.*

Solicitors for respondents co-trustees:—*Sisson & Delay.*

[APPELLATE CRIMINAL JURISDICTION]
TERRELL, Ag. C.J.
July 5, 1937.

REX v. SOH ENG CHIANG.

[SINGAPORE MAGISTRATE'S APPEAL No. 46 of 1937]

Common Gaming Houses Ordinance (Cap. 30) Ss. 4, 9—public lottery—Chap Ji Kee—expert evidence—sufficiency—presumption—interpretation of Statute—"Objects and reasons"—whether relevant.

In a prosecution under Section 4 (c) of the Common Gaming Houses Ordinance for assisting in the carrying on of a public Chap Ji Kee lottery a detective who claimed to be an expert in Chap Ji Kee Lotteries gave evidence as to the *modus operandi* of such a lottery and gave as his opinion that a certain paper writing was a schedule of stakes. The witness' qualifications as an expert were uncontroverted nor was his evidence contradicted. The trial Magistrate rejected the evidence as recording a matter of opinion only and as being insufficient, and acquitted the accused.

Held, on appeal to the High Court against the acquittal, that the evidence given though succinct was sufficient to raise a *prima facie* case against the accused.

Held further, that in construing an Ordinance the professed objects of the legislature on the introduction of the bill are irrelevant.

MAGISTRATE'S APPEAL.

Storr, Crown Counsel, for the Crown (Appellant).